No. 19- __

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE LOGITECH INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JAMES PORATH, individually and on behalf of all others similarly situated,

Real Party in Interest.

On petition for a writ of mandamus to the United States District Court for the Northern District of California, Case No. 3:18-cv-03091-WHA, Hon. William H. Alsup

RENEWED PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Dale J. Giali
Keri E. Borders
MAYER BROWN LLP
350 South Grand Avenue,
25th Floor
Los Angeles, CA 90071
Telephone: (213) 229-9500
Facsimile: (213) 625-0248
dgiali@mayerbrown.com

Donald M. Falk
MAYER BROWN LLP
3000 El Camino Real #300
Palo Alto, CA 94306
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 21-3, petitioner Logitech Inc. states that Logitech International S.A. is the parent corporation of Logitech Inc., and owns more than 10 percent of the stock of Logitech Inc.

Dated: January 25, 2019

/s/ *Dale J. Giali*
Dale J. Giali

Attorney for Petitioner
Logitech Inc.

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INTRODUCTION

Both parties to this false-advertising class action agree that it should be settled, and settled now, without the needless expense of litigation. Petitioner Logitech Inc. has already begun the process of revising the advertisements that gave rise to the lawsuit, and has told plaintiff James Porath that it is committed to concluding a class settlement that will make all similarly affected purchasers whole. Continuing the litigation will only serve to waste the money, time, and resources of all concerned—including the district court.

At present, however, the parties are *required* to continue litigating the case on an adversarial basis, even though they both want to end it. The district court has entered a standing order—as it apparently does in every putative class action—prohibiting the parties from even discussing a class-wide settlement, let alone agreeing to one, until after the parties engage in discovery and brief a contested class certification motion—and the district court decides it.

That order cannot stand. It infringes the parties' First Amendment rights to communicate with each other and to seek relief from the court. The order runs contrary to well-established judicial policy *favoring* the settlement of disputes—particularly class actions. And the settlement ban is

not necessary to serve the district court's stated purpose of weeding out "collusive" class actions; Rule 23 already empowers (indeed, requires) the district court to accomplish that goal.

At this Court's suggestion (*see* No. 18-72732, Dkt. 5), Logitech presented these constitutional arguments to the district court, which considered them but declined to withdraw its order. This Court should therefore issue a writ of mandamus ordering the district court to permit the parties to pursue class settlement negotiations immediately.

BACKGROUND

Petitioner Logitech Inc. manufactures, distributes, and sells peripheral devices used with computers—including, as relevant here, a popular audio speaker system known as the "Logitech Z200." App. 9. In May 2018, Plaintiff James Porath sued Logitech in the U.S. District Court for the Northern District of California, on behalf of putative nationwide and California classes of consumers. Mr. Porath alleges that Logitech falsely advertised the Z200 as having four drivers—*i.e.*, components that produce sound from electrical audio signals—when in fact it only has two. *Id.* He has asserted causes of action for common law fraud and under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and False Advertising Law ("FAL"), *id.* §§ 17500 *et. seq.*

The case was assigned to Judge William H. Alsup. Dkt. 10. Shortly thereafter, on June 13, 2018, the district court entered a standing order regarding the factors that it would consider in evaluating any settlement of the action. Among other things, the order prohibited the parties from discussing any settlement of class claims "prior to class certification." App. 4. The district court indicated that it forbade settlements of class claims before class certification was adjudicated because it perceived a danger that, in such settlements, "class claims have been discounted, at least in part, by the risk that class certification might be denied." App. 4-5. The court explained that, although settling class plaintiffs "should be subject to normal discounts for risks of litigation on the merits," they "should not be subject to a further discount for a risk of denial of class certification." App. 5.

The standing order acknowledged that "there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner" than after class certification. App. 5. In particular, the order noted, early resolution might be warranted "if the proposal will provide full recovery (or very close to full recovery)." *Id.* The order indicated that "[i]f counsel believe settlement discussions should precede a class certifica-

tion, a motion for appointment of interim class counsel must first be made." *Id.* (emphasis omitted).

On August 16, 2018, the parties filed their initial joint case management statement and Rule 26(f) report. App. 8-17. The parties indicated to the court that they had met and conferred regarding alternative dispute resolution, as required by the Northern District's local rules, and that both "strongly believe this case is the rare putative class action that is appropriate for early resolution under the Court's" standing order. App. 14. The parties stated that they anticipated filing stipulations to inform the district court of the relevant facts and that Mr. Porath would be filing a motion for appointment of interim class counsel, as required by the standing order. *Id.* Mr. Porath filed the motion for appointment on August 21. Dkt. 25.

On the same day, the parties jointly filed a stipulation asking the district court to refer them to a magistrate judge for the purpose of pre-certification settlement discussions. The parties indicated that they believed pre-certification settlement was appropriate because (1) Logitech had agreed not to seek a "discount" based on the potential risk that the putative class would not be certified; (2) Logitech had already begun revising the advertising at issue; (3) Logitech was prepared to make all similar-

ly situated purchasers of the Z200 speakers whole; and (4) the parties were prepared to engage in reasonable and appropriate discovery to develop the factual record necessary to resolve the case. App. 20.

Two days later, on August 23, 2018, the district court held a scheduling conference with the parties. At the hearing, the court expressed opposition to allowing settlement at this stage of the case:

> THE COURT: . . . look, here's the problem. It's called collusive settlements. I've had the following scenario. You apply to be -- you bring a class action. The other side realizes that you've got a convicted felon. I'm making this up hypothetically. Or there's some other reason that you don't want the judge to know.
>
> Then you go do a collusive deal, come back, and say: Oh, Judge, we got it off your calendar, no problem. Great. And for X dollars to the class and a huge, much bigger amount to the lawyer, you're going to settle the case.
>
> Well, a lot of judges would rubber-stamp that because they'd love to get rid of the case. Well, I don't do that. My job is to protect the absent class members.
>
> And in that kind of a deal, what the lawyer is doing for Mayer Brown, hypothetically, is buying you off with a big amount and getting a release of class – I've had this happen many times. I stop it when I find out about it. So we are going to find out if you have got a legitimate class first.

App. 26-27.

Counsel for Mr. Porath indicated to the court that they were mindful of the court's concerns about "collusive" settlements and that they believed pre-certification settlement in this case was warranted based on Logitech's stated commitment to change its practices and to make similarly situated consumers whole. App. 29. But the court disagreed, stating:

> I want to go through the normal Rule 23 process. I want to see if the plaintiff is a legitimate plaintiff. I want to see if he's got standing. I want to go through the normal process.
>
> I don't see any good reason -- I have appointed interim counsel in other cases where the company is going out of business, and you'd better get your money now while the getting is good. But that's not our case.
>
> So I don't want you -- see, you lawyers ought to go out there and do -- do the homework. Find out if you have got punitive damages, find -- you know, spend the money on behalf of the class to do your due diligence.
>
> So the motion for interim counsel on this record is denied.

App. 34.

Following the hearing, the district court entered a Rule 16 scheduling order setting a discovery cut-off, expert disclosure due dates, and a tri-

al date, and requiring Mr. Porath to file a motion for class certification by February 7, 2019. App. 38.[1]

On October 8, 2018, Logitech petitioned this Court for a writ of mandamus directing the district court to withdraw its order. *See* Pet. for Writ of Mandamus, *Logitech, Inc. v. U.S. Dist. Court for the N. Dist. of Cal.*, No. 18-72732 (9th Cir. Oct. 8, 2018). A panel of the Court denied the petition without prejudice, on the ground that "[i]t does not appear that the parties have raised the constitutional questions presented in this petition to the district court." Order at 1, *Logitech* (9th Cir. Dec. 24, 2018), ECF No. 5.

Logitech accordingly filed a motion for leave to seek reconsideration of the district court's order prohibiting pre-certification settlement discussions and to stay the action pending resolution of the issue, in which Logitech raised its constitutional objections to the standing order. *See* App. 45-46. The district court denied that motion. App. 46. The court explained

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[1] The order also assigned an ADR process (referring case to a magistrate judge for mediation), as is customary in Rule 16 case management orders. App. 43. But the district court made clear in its June 13, 2018, order and during the August 23, 2018, conference, that the parties are banned from engaging in settlement communications and that settlement talks must await the court's ruling on a class certification motion. App. 4, 25. Consistent with that understanding, the magistrate judge confirmed during a November 5, 2018, initial conference that Judge Alsup's prohibition on discussing settlement applies and that a settlement conference will have to await a ruling on class certification.

that its ban on pre-certification settlement talks (1) "avoids the awkward situation in which counsel waste time on a proposed settlement of issues that should not be litigated or settled on a class-wide basis"; (2) "avoids overbroad releases by absent class members of claims that should not be released"; and (3) "protects the absent class members from inappropriately discounted settlements." App. 46. It contended that, because parties are still free under the standing order to discuss settlement as to the named plaintiff's individual claim at any time, "[n]o permanent or overly broad ban on speech exists," and "[t]o the extent a limited restriction exists, the interests are overwhelmingly outweighed by the interest of the Court in effectuating orderly case management and the interests of the absent class members whose rights are also at risk." App. 48-49. The court also concluded that "[n]o one has a First Amendment right to petition the government (including the courts) on behalf of a class and to impose a release onto a class until a proper representative has been appointed to look out for the class." App. 49. The court declined to stay the action—both in light of its decision on the merits and because "[t]he class certification motion will be decided one way or the other long before any extraordinary writ petition could be determined by our court of appeals." App. 49.

RELIEF SOUGHT

Petitioner seeks a writ of mandamus directing the district court to withdraw its order prohibiting the parties from settling or discussing settlement of class claims prior to its ruling on a motion for class certification. App. 4-5.

ISSUE PRESENTED FOR REVIEW

Whether a district court may forbid parties to a putative class action from engaging in good-faith discussions regarding settlement on a class basis before the court has ruled on class certification, and instead force litigants to expend both their own and the court's resources on costly class certification discovery and adversarial motions practice.

ARGUMENT

In determining whether to issue a writ of mandamus, this Court considers whether: "(1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules, and (5) the order raises new and important problems, or issues of law of first impression." *Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813,

817 (9th Cir. 2004) (citing *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Here, the relevant factors all demonstrate that mandamus relief is warranted. The district court's prohibition on even *discussing* settlement before the court decides class certification is unconstitutional. And the district court's refusal to permit settlement discussions will require the parties to continue litigating a case on an adversarial basis that neither wants to pursue, wasting not only judicial resources but also the resources of both parties—which will not be recoverable in any appeal. This Court should grant mandamus to remedy this clear infringement on the parties' constitutional rights.

I. A RESTRICTION ON PRE-CERTIFICATION CLASS SETTLEMENT NEGOTIATIONS IS UNCONSTITUTIONAL AND IMPROPER.

Mandamus is warranted, first and foremost, because the district court's standing order is "clearly erroneous as a matter of law." *Cole*, 366 F.3d at 817. Indeed, the order violates multiple provisions of the First Amendment, conflicts with the Federal Rules of Civil Procedure, and is in direct tension with the well-settled judicial policy favoring settlements.[2]

[2] In denying reconsideration, the district court suggested that Logitech is "merely disagree[ing] with the exercise of discretion by the district judge" in determining whether to appoint interim class counsel under Rule 23(g) (App. 48), but Logitech respectfully submits that that assess-

A. The District Court's Standing Order Violates The First Amendment.

1. The order is an impermissible, content-based prior restraint on speech

There can be no doubt that the district court's order is subject to the constraints of the First Amendment. As this Court has recognized, "attorneys and other trial participants do not lose their constitutional rights at the courthouse door." *Levine v. U.S. Dist. Court for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985) (applying First Amendment scrutiny to district court order restricting attorney communications with the media). And as the Supreme Court has held time and again, the core command of the First Amendment's Free Speech Clause is that the government "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Indeed, restrictions on speech that are content-based—*i.e.*, that "appl[y] to

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ment was incorrect. Logitech's challenge is not to the district court's ruling on Mr. Porath's motion to appoint interim class counsel, but to the district court's underlying standing order, which is the source of the prohibition on pre-certification settlement discussions unless and until interim counsel is appointed. In any event, the district court's ruling not to appoint interim class counsel was merely ancillary to the standing order that bans settlement discussions. The record, in fact, does not indicate that the district court even considered the fitness of plaintiff's counsel to serve as interim class counsel.

particular speech because of the topic discussed or the idea or message expressed" (*id.* at 2227)—"are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (*id.* at 2226) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992), and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

This presumption of unconstitutionality is even stronger in cases, like this one, where a prior restraint has been imposed. Because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" (*Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)), the government must carry a "heavy burden" in order to justify the restraint (*Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

The district court's standing order imposes a clear prior restraint on the parties' speech: virtually from the outset of the case, they have been under a prospective order not to "discuss" settlement until the court decides a class certification motion. App. 4. And that restriction is just as clearly content-based, because it is limited to a single topic: settlement. *Id.* The order is therefore subject to strict scrutiny. *Reed*, 135 S. Ct. at 2226.

The district court suggested that its order is not subject to strict scrutiny because it is merely a "time, place, and manner" restriction. App. 48. But in order to qualify as a time, place, and manner restriction, a restraint must be content-neutral. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And as noted above, the district court's order is not content-neutral; on the contrary, it singles out a particular subject—classwide settlement—and restricts only speech on that subject. Indeed, even the district court did not contend that its standing order is content-neutral.

It makes no difference to the analysis that the parties remain free to discuss *individual* settlement at any time (App. 48); most, if not all, content-based regulations leave open the possibility of speech on other topics, but they are nonetheless subject to strict scrutiny because they impermissibly single out a particular subject for harsher treatment. Nor does it matter that the parties are permitted to discuss class settlement *after* class certification. App. 48. That fact might be relevant if the district court's order were evaluated as a time, place, and manner restriction, but because the order is content-based, the time, place, and manner test does not apply, making it irrelevant whether the parties have the opportunity to discuss class settlement at a different time. *See, e.g.*, *City of Cincinnati*

v. Discovery Network, Inc., 507 U.S. 410, 430 (1993) (content-based regulation was subject to strict scrutiny, "regardless of whether or not it leaves open ample alternative channels of communication"). The district court's order must accordingly satisfy strict scrutiny if it is to be upheld.

The order cannot pass that stringent test. For one thing, the district court's first stated objective—avoiding the "waste" of counsel's time on settling claims that cannot be certified for class treatment—does not rise to the level of a compelling state interest. Within the broad confines of Rule 11's admonition not to pursue frivolous relief or "needlessly increase the cost of litigation" (Fed. R. Civ. P. 11(b)(1)), the determination of how to pursue litigation is ordinarily left to counsel to make, rather than the court.

With respect to the district court's other stated objectives—*i.e.*, to avoid "overbroad releases by absent class members" and to prevent "inappropriately discounted settlements" (App. 46)—even assuming that one or both rises to the level of a compelling state interest, the restriction on settlement talks is not the "least restrictive means to further [those] interest[s]," as it must be in order to satisfy strict scrutiny. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). On the contrary, the district court could accomplish these purposes without restricting any speech *at*

all, through Rule 23's procedures. If the parties were to agree to a class-wide settlement before class certification, the district court would be obliged to determine whether the proposed settlement class satisfied the requirements of Rule 23(a) and (b). Indeed, a district court "must pay 'undiluted, even heightened, attention' to class certification requirements in a settlement context." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The district court would therefore have ample ability to examine, for example, whether Mr. Porath is an adequate class representative (Fed. R. Civ. P. 23(a)(4)), including his standing to bring a claim, and whether the class is sufficiently cohesive to warrant certification (*id.* 23(a)(2), (3)). To satisfy the Rule 23 analysis, the court could require the parties to do as much "homework" (App. 34) as would be needed to certify a class before a settlement had been reached. The only difference is that a settlement class need not establish that the class is manageable for purposes of trial. *Amchem,* 521 U.S. at 620.

The district court would also have the opportunity to assess the fairness of the proposed settlement before approving it. Rule 23 provides that "[t]he claims . . . of a certified class—or a class proposed to be certified for the purposes of settlement—may be settled, voluntarily dismissed, or

compromised only with the court's approval." Fed. R. Civ. P. 23(e). And a district court may approve a settlement if, and only if, the court concludes after a fairness hearing "that the settlement taken as a whole is fair, reasonable, and adequate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *see* Fed. R. Civ. P. 23(e)(2). Moreover, under this Court's precedents, any settlement reached before class certification would be reviewed under "a higher standard of fairness," given the "unique" concerns involved in such settlements. *Hanlon*, 150 F.3d at 1026. The district court therefore would be able to examine whether the benefits to the members of the settlement class were fair in light of the risks of litigation, whether the release of claims contemplated by the settlement was "overbroad," and whether the settlement had inappropriately discounted the relief awarded to the class. If the proposed settlement were found wanting in any of these respects, the court could reject it.

In short, Rule 23 gives the district court ample "authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process." *Hanlon*, 150 F.3d at 1025. Indeed, the district court has implied that this mechanism is effective at preventing improper settlements, noting that "I've had" such settlements "many times" and that "I stop it when I find out about

it." App. 27. Thus, the district court erred in concluding that, despite its considerable authority to protect the putative class, it was justified in imposing an additional gag order preventing the parties from discussing settlement.

2. The order infringes the parties' right to petition

The district court's order also violates the First Amendment's Petition Clause. The right of petition is "one of the most precious of the liberties safeguarded by the Bill of Rights" (*BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation marks omitted), and encompasses the "right of access to the courts" (*Cal. Mot. Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, as this Court has recognized, "[r]estricting access to the courts is . . . a serious matter" with grave First Amendment implications. *Ringgold-Lockhart v. Cty. of L.A.*, 761 F.3d 1057, 1061 (9th Cir. 2014).

The district court's order substantially infringes upon the parties' access to the court. Although both parties have indicated a strong interest in settlement, the district court's order forbids them from even submitting a proposed settlement agreement to the court for consideration as Rule 23 contemplates. This is an extraordinary measure; courts are ordinarily loath to bar litigants *ex ante* from seeking judicial relief. *Cf. Ringgold-*

Lockhart, 761 F.3d at 1062 (noting that pre-filing orders for vexatious litigation conduct "impose[] a substantial burden on the free-access guarantee" and "should rarely be filed") (internal quotation marks omitted). And there is no need for the district court to bar the parties outright from seeking court approval of a proposed pre-certification settlement as long as it retains plenary authority to review both the putative class and any proposed settlement under Rule 23.

The district court contended that its order does not implicate any rights under the Petition Clause because "[n]o one has a First Amendment right to petition the government (including the courts) on behalf of a class and to impose a release onto a class until a proper representative has been appointed to look out for the class." App. 49. But Rule 23 itself contemplates that very scenario: the entire purpose of the rule is to allow an individual plaintiff who does not yet represent any class to move the court for permission to become a class representative.[3] The district court, in holding that plaintiffs before it may not file Rule 23 motions that are accompanied by proposed settlements, has limited litigants' procedural rights under Rule 23, and thus infringed upon their First Amendment right to petition.

[3] Moreover, Rule 23 ensures that the court will determine whether the proposed class representative is a proper representative *before* "impos[ing] a release" (App. 49) on any class.

Because that restraint lacks any reasonable justification, it should be invalidated.

B. The District Court's Standing Order Conflicts With Rule 23 And The Established Policy Favoring Class Action Settlements.

Finally, the district court's order cannot be squared with the "'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("The compromise of complex litigation is encouraged by the courts and favored by public policy"); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits.").

That policy applies fully in the pre-certification context. Indeed, the Supreme Court has repeatedly scrutinized pre-certification settlements to determine whether the settlement classes were properly certified. *See*, *e,g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999); *Amchem*, 521 U.S. at 628. And the Court has rejected some of those class certifications for reasons overlapping with those expressed by the district court here. But not once did the Court suggest that its review—or the review of the lower courts—was so categorically insufficient to protect class members from

abuse that the parties should not have been permitted to discuss settlement until the conclusion of an adversarial class certification process.

Moreover, the recent amendments to Rule 23 confirm that parties may engage in pre-certification settlement discussions. These amendments reflect the Advisory Committee's judgment that the suitability of a case for class certification is a "key element" of a court's determination of the appropriateness of a proposed settlement, and that, "*if a class has not been certified*," the parties must give the court a sufficient basis in the record to conclude that it will be able to certify the class "after the final hearing" assessing the settlement. Fed. R. Civ. P. 23(e)(1) advisory committee's note to 2018 amendment.

All of this just makes sense; settlement is beneficial to litigants and the court: it conserves the court's and the parties' resources, and it often allows the parties to reach a mutually acceptable resolution to a dispute rather than going to trial and running the risk of an all-or-nothing verdict. For these reasons, both this Court's rules and the district court's seek to encourage settlement by providing voluntary or mandatory settlement mechanisms to parties. *See* Ninth Cir. R. 33-1 (creating the Circuit Mediation Office); N.D. Cal. ADR Local Rule 3 (creating a multi-option ADR program for civil cases); N.D. Cal. Procedural Guidance for Class Action Set-

tlements (as amended Dec. 5, 2018) (setting out information about settlement to be provided to district court "[i]f a litigation class has not been certified").[4]

The district court's standing order undermines these efforts by barring parties from presenting *any* pre-certification settlement proposal to the court, or even discussing one among themselves. Early settlements conserve considerable resources in cases like this, where the alternative is months or years of litigation until a class certification motion and, potentially, a summary judgment motion or trial can be resolved. The standing order replaces this speedy and efficient solution to disputes with additional litigation—litigation that serves little purpose, given that the parties agree about the need for class adjudication and the proper scope of class relief.

That is a perverse result. A district court should *encourage* parties to explore settlement, not preemptively shut down any and all settlement discussions. And although a district court is required to scrutinize any settlement for fairness to absent class members, it should not be in the business of preventing settlement altogether and denying absent class members even the chance of obtaining speedy relief. This Court should inter-

[4] https://www.cand.uscourts.gov/ClassActionSettlementGuidance.

vene and put a stop to the district court's erroneous and unwarranted bar on pre-certification settlement.

II. MANDAMUS RELIEF IS WARRANTED.

The remaining *Bauman* factors also weigh strongly in favor of issuing a writ of mandamus.

1. To begin with, Logitech has no other means of obtaining relief. Appellate review by this Court after a final judgment below would not be an adequate substitute for mandamus relief, because Logitech's entire purpose in seeking mandamus relief is to avoid being forced to litigate the case any further. Neither can Logitech obtain relief through an interlocutory appeal under 28 U.S.C. § 1292(b). The district court denied Logitech's motion to stay the case pending resolution of the issues presented here, indicating that it intends to forge ahead with the class certification process immediately. App. 49 ("The class certification motion will be decided one way or the other long before any extraordinary writ petition could be determined by our court of appeals."). Given the district court's apparent intent to complete the class certification process in a matter of months, it is effectively certain that the court will not certify the issues here for interlocutory review.

2. Logitech (and Mr. Porath) also will be harmed by the order, in a way not correctable on appeal, if a writ does not issue. *Cole*, 366 F.3d at 817. The standing order effectively conscripts the two parties into litigating the class certification motion, which will require Logitech to incur substantial legal costs, likely in the hundreds of thousands of dollars—one reason why it is interested in settling the case now. Those costs will never be recoverable on appeal.

3. Next, the district court's error is clearly both "oft-repeated" and emblematic of a "persistent disregard of the federal rules." *Cole*, 366 F.3d at 817. As the district court has acknowledged, it issues the standing order discussed in this petition in substantially the same form "at the outset of any proposed class action" assigned to it. App. 44.[5] Unless this Court intervenes, therefore, the district court may impede many other parties in

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[5] *See also, e.g.*, Notice and Order Re Putative Class Actions at 4, *Kent v. Abaxis, Inc.*, No. 3:18-cv-03834-WHA (N.D. Cal. Sept. 11, 2018), ECF No. 5 ("The parties shall not discuss settlement as to any class claims prior to class certification."); Notice and Order Re Putative Class Actions at 4, *Felix v. Symantec Corp.*, No. 3:18-cv-02902-WHA (N.D. Cal. July 20, 2018), ECF No. 49 (same); Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement at 4, *McFaddin v. Conagra Brands, Inc.*, No. 3:17-cv-00387-WHA (N.D. Cal. Feb. 9, 2017), ECF No. 19 ("[I]t is better to develop and to present a proposed compromise *after* class certification."); Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement at 4, *Backus v. Conagra, Inc.*, No. 3:16-cv-00454-WHA (N.D. Cal. Apr. 8, 2016), ECF No. 22 (same).

many other class actions from engaging in reasonable, pre-certification settlement efforts.

4. Finally, the issue presented is both new and important. *Cole*, 366 F.3d at 817. Logitech is unaware of any other cases addressing the question whether a district court may prohibit litigants in putative class actions from discussing settlement prior to class certification, as a standing matter of policy. Courts across the Circuit would benefit from this Court's guidance about whether this practice is permissible, particularly in light of the many tools that district courts already have at their disposal to ensure the fairness of pre-certification class action settlements.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

/s/ *Dale J. Giali*

DALE J. GIALI
KERI BORDERS
Mayer Brown LLP
350 South Grand Avenue,
25th Floor
Los Angeles, CA 90071
(213) 229-9500

DONALD M. FALK
Mayer Brown LLP
Two Palo Alto Square
Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Counsel for Petitioner

Dated: January 25, 2019

STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases pending in this Court.

Dated: January 25, 2019 /s/ *Dale J. Giali*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for petitioner certifies that this petition:

(i) complies with the length limitation of Circuit Rules 21-2 and 32-3 because it contains 5,271 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: January 25, 2019 /s/ *Dale J. Giali*

CERTIFICATE OF SERVICE

I hereby certify that that on January 25, 2019, I electronically filed the foregoing petition with the Clerk of the Court using the appellate CM/ECF system. Service has been accomplished via overnight delivery to the following counsel for James Porath:

Todd M. Logan
Rafey Sarkis Balabanian
Edelson PC
123 Townsend Street, Suite 100
San Francisco, CA 94107
tlogan@edelson.com
rbalabanian@edelson.com

The district court has been provided with a copy of this petition via overnight delivery to:

The Hon. William H. Alsup
U.S. District Court for the Northern District of California
Phillip Burton Federal Building & United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Dated: January 25, 2019 /s/ *Dale J. Giali*

APPENDIX

INDEX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LOGITECH, INC.,

Defendant.

/

No. C 18-03091 WHA

NOTICE AND ORDER RE PUTATIVE CLASS ACTIONS AND FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT

It has become a recurring problem in putative class actions that one or both sides may wish to interview absent putative class members regarding the merits of the case, potentially giving rise to conflict-of-interest or other ethical issues. To get ahead of this problem, the undersigned judge requires both sides to **MEET AND CONFER** and agree on a detailed proposed protocol for interviewing absent putative class members. In their joint case management statement due at the outset of the case, the parties shall either describe their agreed-upon protocol or explain why no such protocol is necessary in their particular case. No interviews of absent putative class members may take place unless and until the undersigned judge has reviewed and approved the parties' proposed protocol, or has agreed that no such protocol is necessary.

* * *

For the guidance of counsel, please review the *Procedural Guidance for Class Action Settlements*, which is available on the website for the United States District Court for the Northern District of California at www.cand.uscourts.gov/ClassActionSettlementGuidance.

In addition, counsel should review the following substantive and timing factors that the undersigned judge will consider in determining whether to grant preliminary and/or final approval to a proposed class settlement. Many of these factors have already been set forth in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011), but the following discussion further illustrates the undersigned judge's consideration of such factors:

1. ADEQUACY OF REPRESENTATION.

Anyone seeking to represent a class, including a settlement class, must affirmatively meet the Rule 23 standards, including adequacy. It will not be enough for a defendant to stipulate to adequacy of the class representation (because a defendant cannot speak for absent class members). An affirmative showing of adequacy must be made in a sworn record. Any possible shortcomings in a plaintiff's resume, such as a conflict of interest, a criminal conviction, a prior history of litigiousness, and/or a prior history with counsel, must be disclosed. Adequacy of counsel is not a substitute for adequacy of the representative.

2. DUE DILIGENCE.

Please remember that when one undertakes to act as a fiduciary on behalf of others (here, the absent class members), one must perform adequate due diligence before acting. This requires the representative and his or her counsel to investigate the strengths and weaknesses of the case, including the best-case dollar amount of claim relief. A quick deal up front may not be fair to absent class members.

3. COST-BENEFIT FOR ABSENT CLASS MEMBERS.

In the proposed class settlement, how do the costs of what absent class members will give up compare to the benefits of what they will receive in exchange? If the recovery will be a full recovery, then much less will be required to justify the settlement than for a partial recovery, in which case the discount will have to be justified. The greater the discount, the greater must be the justification. This will require an analysis of the specific proof, such as a synopsis of any conflicting evidence on key fact points. It will also require a final class-wide damage study or a very good substitute, in sworn form. If little discovery has been done to see

how strong the claim is, it will be hard to justify a substantial discount on the mere generalized theory of "risks of litigation." A coupon settlement will rarely be approved. Where there are various subgroups within the class, counsel must justify the plan of allocation of the settlement fund.

4. THE RELEASE.

The proposed release should be limited only to the claims certified for class treatment. Language releasing claims that "could have been brought" is too vague and overbroad. The specific statutory or common law claims to be released should be spelled out. Class counsel must justify the release as to each claim released, the probability of winning, and its estimated value if fully successful.

Does the proposed class settlement contemplate that claims of absent class members will be released even for those whose class notice is returned as undeliverable? Usually, the Court will *not* extinguish claims of individuals known to have received no notice or who received no benefit (and/or for whom there is no way to send them a settlement check). Put differently, usually the release must extend only to those who receive money for the release.

5. EXPANSION OF THE CLASS.

Typically, defendants vigorously oppose class certification and/or argue for a narrow class. In settling, however, defendants often seek to expand the class, either geographically (*i.e.*, nationwide) or claim-wise (including claims not even in the complaint) or person-wise (*e.g.*, multiple new categories). Such expansions will be viewed with suspicion. If an expansion is to occur it must come with an adequate plaintiff and one with standing to represent the add-on scope and with an amended complaint to include the new claims, not to mention due diligence as to the expanded scope. The settlement dollars must be sufficient to cover the old scope plus the new scope. Personal and subject-matter jurisdiction over the new individuals to be compromised by the class judgment must be shown.

6. REVERSION.

A proposed class settlement that allows for a reversion of settlement funds to the defendant(s) is a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.

7. CLAIM PROCEDURE.

A settlement that imposes a claim procedure rather than cutting checks to class members for the appropriate amount may (or may not) impose too much of a burden on class members, especially if the claim procedure is onerous, or the period for submitting is too short, or there is a likelihood of class members treating the notice envelope as junk mail. The best approach, when feasible, is to calculate settlement checks from a defendant's records (plus due diligence performed by counsel) and to send the checks to the class members along with a notice that cashing the checks will be deemed acceptance of the release and all other terms of the settlement.

8. ATTORNEY'S FEES.

To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel, just as in common fund cases. Please avoid agreement on any division, tentative or otherwise. A settlement whereby the attorney seems likely to obtain funds out of proportion to the benefit conferred on the class must be justified.

9. DWINDLING OR MINIMAL ASSETS?

If the defendant is broke or nearly so with no prospect of future rehabilitation, a steeper discount may be warranted. This must be proven. Counsel should normally verify a claim of poverty via a sworn record, thoroughly vetted.

10. TIMING OF PROPOSED SETTLEMENT.

The parties shall not discuss settlement as to any class claims prior to class certification. To elaborate, when a class settlement is proposed prior to formal class certification, there is a risk that class claims have been discounted, at least in part, by the risk that class certification

might be denied. Absent class members, of course, should be subject to normal discounts for risks of litigation on the merits but they should not be subject to a further discount for a risk of denial of class certification, such as, for example, a denial based on problems with a proposed class representative, including a conflict of interest or a prior criminal conviction. *See* Howard Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL (Nov. 24, 2014). This is a main reason the Court prefers to litigate and vet a class certification motion *before* any class settlement discussions take place. That way, the class certification is a done deal and cannot compromise class claims. Only the risks of litigation on the merits can do so.

In order to have a better record to evaluate the foregoing considerations, it is better to develop and to present a proposed compromise *after* class certification, *after* diligent discovery on the merits, and *after* the damage study has been finalized. On the other hand, there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner. For example, if the proposal will provide full recovery (or very close to full recovery) then there is little need for more due diligence. The poorer the settlement, however, the more justification will be needed and that usually translates to *more* discovery and *more* due diligence; otherwise, it is best to let absent class members keep their own claims and fend for themselves rather than foist a poor settlement on them. Particularly when counsel propose to compromise the potential claims of absent class members in a low-percentage recovery, the Court will insist on a detailed explanation of why the case has turned so weak, an explanation that usually must flow from discovery and due diligence, not merely generalized "risks of litigation." Counsel should remember that merely filing a putative class complaint does not authorize them to extinguish the rights of absent class members. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.* "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

11. A RIGHT TO OPT OUT IS NOT A CURE-ALL.

A borderline settlement proposal cannot be justified merely because absent class members may opt out if they wish. The Court has (and counsel have) an independent, stand-alone duty to assess whether the proposed class settlement is reasonable and adequate. Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal. There is no advocate to critique the proposal on behalf of absent class members. That is one reason that Rule 23(e) insists that the district court vet all class settlements.

12. INCENTIVE PAYMENT.

If the proposed class settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated? Class litigation proceeded well for many decades before the advent of requests for "incentive payments," which too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff. A request for an incentive payment is a red flag.

13. NOTICE TO CLASS MEMBERS.

Is the notice in plain English, plain Spanish, and/or plain Chinese (or the appropriate language)? Does it plainly lay out the salient points, which are mainly the foregoing points in this memorandum? Will the method of notice distribution really reach every class member? Will it likely be opened or tossed as junk mail? How can the envelope design enhance the chance of opening? Can mail notice be supplemented by e-mail notice?

* * *

Counsel will please see from the foregoing that the main focus will be on what is in the best interest of absent class members. Counsel should be mindful of the factors identified in *In re Bluetooth*, 654 F.3d at 946–47, as well as the fairness considerations detailed in *Hanlon*, 150 F.3d at 1026. Finally, for an order denying proposed preliminary approval based on many

of the foregoing considerations, *see Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007).

IT IS SO ORDERED.

Dated: June 13, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Rafey S. Balabanian (SBN 315962)
rbalabanian@edelson.com
Todd Logan (SBN 305912)
tlogan@edelson.com
EDELSON PC
123 Townsend Street,
San Francisco, California 94107
Tel: 415.212.9300
Fax: 415.373.9435

Counsel for Plaintiff and the Putative Classes

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LOGITECH, INC.,

Defendant.

Case No. 3:18-cv-03091-WHA

INITIAL JOINT CASE MANAGEMENT STATEMENT AND FED R. CIV. P. 26(f) REPORT

Date: August 23, 2018
Time: 11:00 a.m.
Room: Courtroom 12, 19th Floor
450 Golden Gate Avenue
San Francisco, California 94102

Judge: Hon. William Alsup

I. JURISDICTION AND SERVICE

The Court may exercise subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(d)(2) because (i) at least one member of the putative "Nationwide Class" is a citizen of a different state than Defendant, (ii) the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and (iii) none of the exceptions under § 1332(d)(2) apply to this action.

Defendant has been served and does not object to personal jurisdiction or venue.

II. FACTS

Defendant manufactures, distributes, and sells the "Logitech Z200," a popular computer speaker system comprised of two speakers. Dkt. 1 ¶ 2.

Plaintiff alleges that Defendant deceptively markets the Z200 system by advertising that the Z200 system includes four drivers when in fact the Z200 system includes only two drivers. *Id.* ¶¶ 42. Plaintiff further alleges that he purchased the Z200 system in reliance on Defendant's four-driver representation, and that he would have either paid less for the Z200 system or not purchased it at all if he knew that it contained only two drivers. *Id.* ¶ 46. Seeking redress for his alleged injuries, plaintiff brought this putative class action alleging common law fraud as well as claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), and California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL"). *Id.* ¶ 55-81.

Defendant asserts that many consumers were not exposed to the alleged deceptive advertising (claims that the speakers had four drivers appeared on some, but not all, of the advertising for the speakers), that the speakers were priced consistent with speakers that would have two active drivers, and that regardless of what advertising a consumer may have been exposed to, the speakers performed in a manner consistent with consumers' expectations. Whatever damages plaintiff pursues must take into account the actual value received from the two driver speakers.

III. LEGAL ISSUES

The key legal issues in this case are likely to be (1) whether Defendant's marketing of the Z200 system as having four drivers is a marketing practice that is "likely to mislead" an objective reasonable consumer as that term is construed under UCL and FAL caselaw, (2) whether Defendant intended to mislead consumers through the challenged marketing practice, and (3) whether the action can be maintained as a class action under Rule 23 and, if so, the definition, including geographic scope, of class membership.

Plaintiff contends that this case is similar to *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 906 (N.D. Cal. 2016) (Seeborg, J.); *Brickman v. Fitbit, Inc.*, No. 3:15-cv-02077, 2017 WL 5569827, at *9 (N.D. Cal. Nov. 20, 2017) (Donato, J.); and *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231 (N.D. Cal. 2014) (Tigar, J.).

Defendant contends this case, like all cases, must be decided based on an application of the relevant law to the particular record presented.

IV. MOTIONS

There are no pending motions before the Court. The parties previously submitted a stipulation proposing an amended briefing schedule in advance of a potential motion to dismiss. Dkt. 16. The stipulation was granted in part and denied in part. Dkt. 17. Defendant subsequently did not to move to dismiss but instead filed an answer. Dkt. 18.

Shortly after filing this Joint Case management Statement, the parties anticipate filing a stipulation requesting—consistent with the Court's Notice and Order re Putative Class Actions and Factors to be Evaluated for any Proposed Class Settlement, Dkt. 16—that the Court refer the case to a Magistrate Judge for an early pre-certification settlement conference. Pursuant to the Court's Notice and Order re Putative Class Actions and Factors to be Evaluated for any Proposed Class Settlement, Dkt. 16 at 5, Plaintiff will contemporaneously file a motion for appointment of interim class counsel.

If the Parties do not reach an early resolution before a Magistrate Judge, Plaintiff anticipates filing a motion for class certification, a motion for summary judgment, and potentially one or more *Daubert* motions.

If the Parties do not reach an early resolution before a Magistrate Judge, Defendant anticipates filing a motion for summary judgment and potentially one or more *Daubert* motions.

V. AMENDMENT OF PLEADINGS

The parties do not currently anticipate any amendment of pleadings, but jointly propose a deadline to amend without leave of Court of September 21, 2018.

VI. EVIDENCE PRESERVATION

The Parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information (the "ESI Guidelines"). The Parties have additionally conferred with their respective counsel about the need to preserve evidence that may be relevant to Plaintiff's claims or Defendant's defenses, including the preservation of electronically stored information. The Parties may submit a stipulated Protective Order.

VII. DISCLOSURES

Plaintiff has served his initial disclosures pursuant to Fed. R. Civ. P. 26(a). Defendant will serve its initial disclosures prior to the initial case management conference.

VIII. DISCOVERY

A. Scope of Discovery:

No discovery has been taken to date, and the parties have no discovery related disputes. The parties do not propose any modifications to the discovery rules and they believe class and merits discovery should proceed simultaneously.

Plaintiff anticipates propounding discovery on the following non-exhaustive list of topics: (1) information related to the development, design, and manufacturing of the Z200 system (2) information relating to the development, design, distribution, and use of advertisements for the Z200 system (specifically including Defendant's use and understanding of the term "driver," as

used in Defendant's marketing copy); and (3) information concerning sales of and/or revenue derived from the Z200 system.

Defendant anticipates propounding discovery on the following non-exhaustive list of topics: Plaintiff's purchasing experience and plaintiff's experience with the speakers.

The parties propose an eight (8) month fact discovery period (for both class and merits) that commences immediately after the initial Case Management conference. More specifically, the Parties proposes that fact discovery close on **April 19, 2019**; that any expert reports be disclosed on **May 17, 2019**; that any rebuttal expert reports be disclosed on **June 7, 2019**; and that all expert discovery close on **June 28, 2019.** The Parties propose that briefing on certification and merits issues commence following the close of fact and expert discovery.

B. Form of Electronic Discovery, Confidential Information, and Claims of Privilege:

The Parties agree that discovery will encompass ESI and will work together in good faith regarding the disclosure of ESI. The Parties anticipate potentially preparing an appropriate stipulation (or stipulations), subject to Court approval, governing protection of confidential and proprietary information and procedures for handling inadvertent production of privileged information and other privilege waiver issues.

IX. CLASS ACTIONS

Plaintiff anticipates filing a motion for class certification, pursuant to Fed. R. Civ. P. 23(b)(2) and Rule 23(b)(3), of two classes of similarly situated individuals defined as follows:

> **Nationwide Class**: All individuals in the United States who purchased Logitech's Z200 stereo sound system.
>
> **California Subclass:** All members of the Nationwide Class that are domiciled in the State of California.

Because the class certification briefing in this case is likely to feature expert reports, the parties propose that class certification briefing begin only after the close of all discovery (*i.e.*,

after the close of fact and expert discovery). Specifically, the Parties propose that the deadline for Plaintiff's motion for class certification be July 26, 2019.

X. RELATED CASES

The Parties are unaware of any related cases.

XI. RELIEF SOUGHT

A. Plaintiff's Position:

Plaintiff respectfully requests that the Court enter an Order (or Orders): (i) certifying this case as a class action on behalf of the Classes defined above, appointing Plaintiff as representative of the Classes, and appointing his counsel as class counsel; (ii) declaring that Defendant's actions, as set out above, constitute common law fraud and violate the UCL and FAL; (iii) awarding damages to Plaintiff and the Classes in an amount to be determined at trial; (iv) awarding restitution to Plaintiff and the Classes in an amount to be determined at trial; (v) awarding Plaintiff and the Classes their reasonable litigation expenses and attorneys' fees; (vi) awarding Plaintiff and the Classes pre- and post-judgment interest, to the extent allowable; (vii) awarding such other injunctive and declaratory relief as is necessary to protect the interests of Plaintiff and the Classes; and (viii) awarding such other and further relief as the Court deems reasonable and just.

B. Defendant's Position: As stated elsewhere in this report and in additional anticipated filings with the Court, Defendant believes this case should proceed to early classwide resolution. Plaintiff has pointed out aspects of some of the advertising of Defendant's Z200 speakers that led to confusion. Defendant is prepared to change (indeed, already has begun changing) that advertising and is prepared to make plaintiff and all similarly situated consumers whole with respect to any damages that may have been caused by the challenged advertising.

In the event the case does not settle at an early stage, Defendant will seek, via the class certification proceedings and by summary judgment motion, to limit the lawsuit to only those consumers for whom the challenged advertising was a material inducement for purchase and

only to the extent the consumer's purchase of the Z200 speakers failed to meet the consumer's reasonable expectations.

XII. SETTLEMENT AND ADR

Having met and conferred in compliance with ADR Local Rule 3-5, the Parties strongly believe this case is the rare putative class action that is appropriate for early resolution under the Court's Notice and Order re Putative Class Actions and Factors to be Evaluated for any Proposed Class Settlement, Dkt. 16. Consistent with the specifics of that Order, the parties anticipate filing a stipulation providing the Court with the relevant record, and Plaintiff anticipates filing a motion for appointment of interim class counsel.

XIII. CONSENT TO MAGISTRATE JUDGE

No.

XIV. OTHER REFERENCES

At this time, the Parties do not believe that this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

XV. NARROWING OF ISSUES

The Parties are not aware of any issues that can be narrowed by agreement or by motion.

XVI. EXPEDITED TRIAL PROCEDURE

The Parties do not believe that this case should be handled via the Court's Expedited Trial Procedure.

XVII. SCHEDULING

The parties propose the following scheduling deadlines:

EVENT	DEADLINE
Fact discovery cutoff (class and merits)	April 19, 2019
Designation of experts	May 17, 2019
Rebuttal expert reports	June 7, 2019

EVENT	DEADLINE
Expert discovery cutoff	June 28, 2019
Plaintiff's motion for class certification due	July 26, 2019
Hearing on motion for class certification	September 19, 2019
Dispositive motions deadline	28 days after the Court's order re: class certification
Hearing on dispositive motions	At the Court's convenience
Pretrial conference	TBD
Trial	TBD

XVIII. TRIAL

Plaintiff has requested a trial by jury of all matters that can be so tried, which include at least Plaintiff's common law fraud claim. A bench trial may additionally be necessary to resolve Plaintiff's UCL and FAL claims. The Parties expect trial to take 5-10 days. The Parties will familiarize themselves with this Court's separate standing guidelines for preparation for the final pretrial conference and trial.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

A. Plaintiff's Statement: Plaintiff does not know of any interests other than those of the named parties to the action and their attorneys.

B. Defendant's Statement: Defendant does not know of any interests other than those of the named parties to the action and their attorneys.

XX. PROFESSIONAL CONDUCT

Counsel have reviewed the applicable Guidelines for Professional Conduct.

XXI. OTHER MATTERS

The Parties are unaware of other matters that may facilitate the just, speedy, and inexpensive disposition of this action.

XXII. OPPORTUNITIES FOR JUNIOR LAWYERS

Plaintiff's counsel, Edelson PC, is a law firm with fewer than fifty attorneys. Nevertheless, it wishes to address paragraph three of the Court's supplemental initial case management order. Edelson PC intends for Todd Logan, a third-year attorney at Edelson PC (and plaintiff's undersigned counsel), to be substantially involved in all motions and depositions in this case. Specifically, Mr. Logan will likely be the principal drafter and signatory of any motion for class certification and any summary judgment briefing. Mr. Logan will also—likely under the supervision of a more senior attorney—defend any deposition of Mr. Porath and take depositions of Logitech's key fact witnesses. Should this case reach trial, Edelson PC will ensure that Mr. Logan examines at least one key witness at trial.

Defendant's counsel, Mayer Brown, is a law firm with more than fifty attorneys. As noted previously in this report, this case will likely not proceed to case dispositive motions or trial. But, to the extent it does, both Rebecca Johns (a six-year attorney) and Alexander Vitruk (a first year attorney) are actively involved in this case and will be substantially involved in all motions, fact investigation, discovery, and depositions. As this is a class action with one named plaintiff, there will not be substantial opportunities to take depositions, however, Ms. Johns and Mr. Vitruk will be involved in preparing Logitech's witnesses for deposition and defending their depositions. Should this case proceed to trial, Mayer Brown will ensure that Ms. Johns examines at least one witness at trial.

Respectfully submitted,

Dated: August 16, 2018

EDELSON PC

By:/s/ *Todd Logan*
Todd Logan

Attorneys for Plaintiff James Porath

Dated: August 16, 2018

MAYER BROWN LLP

By:/s/ *Keri E. Borders*
Keri E. Borders

Attorneys for Defendant Logitech, Inc.

FILER'S ATTESTATION

I, Todd Logan, am the ECF user whose identification and password are being used to file this Initial Joint Case Management Statement and Fed. R. Civ. P. 26(f) Report. I hereby attest that all signatories listed on the preceding page concur in this filing.

Dated: August 16, 2018

/s/ Todd Logan

MAYER BROWN LLP
DALE J. GIALI (SBN 150382)
dgiali@mayerbrown.com
KERI E. BORDERS (SBN 194015)
kborders@mayerbrown.com
REBECCA B. JOHNS (SBN 293989)
rjohns@mayerbrown.com
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Defendant
LOGITECH, INC.

[ADDITIONAL PARTY ON SIGNATURE PAGE]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAMES PORATH, individually on behalf of all others similarly situated individuals,

Plaintiffs,

v.

LOGITECH, INC., a California corporation,

Defendant.

Case No. 3:18-cv-03091

STIPULATED MOTION AND [PROPOSED] ORDER REFERRING PARTIES TO PRE-CERTIFICATION MAGISTRATE JUDGE SETTLEMENT CONFERENCE

Complaint Filed: May 23, 2018

Plaintiff James Porath ("Plaintiff") and defendant Logitech, Inc. ("Logitech") (collectively, the "Parties"), by and through their respective counsel of record, hereby agree to and request a Court order referring the parties to a settlement conference before Magistrate Judge Jacqueline Scott Corley for the purpose of pre-class certification settlement discussions. Mindful of the Court's June 13, 2018 Notice and Order re Putative Class Actions and Factors To Be Evaluated For Any Proposed Class Settlement (ECF No. 16), the Parties stipulate and agree as follows:

WHEREAS, on May 23, 2018, Plaintiff filed his complaint in this matter (ECF No. 1), alleging that certain of the advertising of Logitech's Z200 speakers that he relied on in his purchasing decision misled him into believing he was purchasing a speaker set that had two drivers per speaker when, in fact, each speaker had only one driver;

WHEREAS, on June 13, 2018, the Court issued its June 13, 2018 Notice and Order re Putative Class Actions and Factors To Be Evaluated For Any Proposed Class Settlement, ECF No. 16 (the "Order");

WHEREAS, the Parties have carefully reviewed the Order and confirm their current and anticipated future compliance with its terms;

WHEREAS, on July 19, 2018, Logitech answered the complaint (ECF No. 18);

WHEREAS, on July 23, 2018, Logitech emailed Plaintiff's counsel expressing an interest in resolving the case by making the putative class whole but noting that, pursuant to the Order, the necessary first step would be to obtain leave from this Court to begin any settlement discussions,

WHEREAS, the Parties subsequently discussed the steps necessary to obtain an order from this Court granting the Parties leave to discuss a pre-certification resolution, but, mindful of the Order, made certain not to discuss specific settlement terms, attorneys' fees, incentive awards, or anything similar,

WHEREAS, the Parties believe that this may be the rare putative class action case that, under the Order, is appropriate for early class resolution because:

- For purposes of the proposed settlement negotiations before Magistrate Judge Corley, Logitech agrees to negotiate a settlement on a class basis and will not seek a "discount" based on the potential risk that the putative class is not certified.
- Logitech has confirmed to Plaintiff that it has already begun the process of revising the challenged advertising to address the specific issue experienced by Plaintiff.
- Logitech has further confirmed that it is prepared to negotiate a resolution with Plaintiff and other similarly situated consumers with respect to purchases of the Z200 speakers to make all such consumers whole.
- Logitech has further confirmed that it is prepared to memorialize such resolution in a class settlement, subject to review and approval by the Court;
- The Parties have further confirmed that they are prepared to provide reasonable and appropriate discovery to develop the factual record necessary to negotiate and reach an appropriate resolution.
- Plaintiff's counsel intends to file a motion for appointment of interim lead counsel no later than August 22, 2018.
- The Parties have agreed to seek a referral to Magistrate Judge Jacqueline Scott Corley for a Magistrate Judge Settlement Conference.

WHEREAS, because Logitech is prepared to proceed immediately to negotiating, on a class basis, a resolution of the issue experienced by Plaintiff and other similarly situated consumers, **and to making such consumers whole**, the Parties do not believe that continuing to expend resources litigating the matter, or that class certification proceedings, are necessary or an efficient course of action or in the best interest of the putative class; and

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the Parties, subject to approval from the Court, that:

1. The Parties are familiar with and will abide by the Order;

2. Upon the requested referral, the Parties will convene a settlement conference before Magistrate Judge Jacqueline Scott Corley to explore a class settlement on terms consistent with the Order; and

3. The Parties shall report to the Court regarding the progress of the settlement discussions and anticipated future actions.

Dated: August 21, 2018

EDELSON PC
Rafey Balabanian
Todd Logan

By: */s/ Todd Logan*
Todd Logan
Attorneys for Plaintiff and the Putative Class

Dated: August 21, 2018

MAYER BROWN LLP
Dale J. Giali
Keri E. Borders
Rebecca B. Johns

By: */s/ Dale J. Giali*
Dale J. Giali
Attorneys for Defendant Logitech, Inc.

ATTESTATION

I, Dale J. Giali, hereby attest, pursuant to N.D. Cal. Local Rule 5-1(i)(3) that concurrence to the filing of this document has been obtained from each signatory.

By: */s/ Dale J. Giali*
Dale J. Giali
Attorney for Defendant Logitech, Inc.

[PROPOSED] ORDER

Pursuant to stipulation, it is **SO ORDERED** that:

1. The Parties may convene a settlement conference to explore a class settlement on terms consistent with the Court's June 13, 2018 Order (ECF No. 16);

2. The case is referred for settlement purposes to Magistrate Judge Jacqueline Scott Corley to conduct an early settlement conference; and

3. The Parties shall report to the Court regarding the progress of the settlement discussions, as well as their anticipated course of action regarding settlement, within 7 days of the completion of the settlement conference with Magistrate Jacqueline Scott Corley.

DATED: _____

_____
HONORABLE WILLIAM ALSUP
United States District Judge

Pages 1 - 13

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

JAMES PORATH, Plaintiff, VS. LOGITECH, INC., Defendant.	)	NO. C 18-3091 WHA San Francisco, California

Thursday, August 23, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

EDELSON, PC
123 Townsend Street
Suite 100
San Francisco, California 94107
BY: RAFEY S. BALABANIAN, ESQ.
TODD M. LOGAN, ESQ.

For Defendant:

MAYER BROWN LLP
350 South Grand Avenue.
25th Floor
Los Angeles, California 90071
BY: DALE J. GIALI, ESQ.

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

Thursday - August 23, 2018 **11:08 a.m.**

P R O C E E D I N G S

THE COURT: All right. Everyone here on Logitech? All right, let's come forward.

THE CLERK: Calling Civil Case No. 18-3091, James Porath versus Logitech.

MR. BALABANIAN: Good morning, Your Honor. Rafey Balabanian, and I'm joined by Todd Logan, on behalf of plaintiff Porath and the putative class.

MR. GIALI: Good morning, Your Honor. Dale Giali on behalf of defendant Logitech.

THE COURT: Sorry, is this a proposed class action?

MR. BALABANIAN: It is, Your Honor. And at the outset, I want to apologize to the Court for one oversight in our joint case management statement.

While we did go over the Court's notice and procedure with respect to class actions, and are quite familiar with it, we failed to provide a protocol with respect to interviewing absent class members.

THE COURT: Well, but you can't even talk settlement until -- until there's a certified class.

MR. BALABANIAN: Correct.

THE COURT: You understand that.

MR. BALABANIAN: Absolutely, we understand that. There are issues that touch upon that in the joint case

management statement, Your Honor.

We've also filed, my firm has, a motion for appointment of interim lead counsel in conformity with the Court's --

THE COURT: Why can't we go through the normal -- why do you need to be appointed lead counsel now?

MR. BALABANIAN: In order to speak settlement. That would be the purpose.

THE COURT: But why -- are they going out of business?

MR. BALABANIAN: They are not.

THE COURT: Then why -- what's the -- I need for my law clerk to go get me -- I don't have a form CMO here. You didn't give me that. That's in the Logitech case.

But I can wait -- see, look, here's the problem. It's called collusive settlements. I've had the following scenario. You apply to be -- you bring a class action. The other side realizes that you've got a convicted felon. I'm making this up hypothetically. Or there's some other reason that you don't want the judge to know.

Then you go do a collusive deal, come back, and say: Oh, Judge, we got it off your calendar, no problem. Great. And for X dollars to the class and a huge, much bigger amount to the lawyer, you're going to settle the case.

Well, a lot of judges would rubber-stamp that because they'd love to get rid of the case. Well, I don't do that. My

job is to protect the absent class members.

And in that kind of a deal, what the lawyer is doing for Mayer Brown, hypothetically, is buying you off with a big amount and getting a release of class -- I've had this happen many times. I stop it when I find out about it. So we are going to find out if you have got a legitimate class first.

Now, if they are going bankrupt and have some legitimate reason why you've got to negotiate now, I will hear you out on that. What is your reason?

MR. BALABANIAN: If I can just speak to the issues briefly, Your Honor, because I'm very familiar with the Court's viewpoint on class actions and the concerns about an early settlement compromising the interest of absent class members through a reverter settlement, a claims-made settlement that's not exhaustive of --

THE COURT: Or doing one before you've done your homework.

MR. BALABANIAN: Absolutely.

THE COURT: Until you've deposed everybody in sight, so we know whether you've got a good class.

MR. BALABANIAN: And certainly, as the Court is a fiduciary of the class, so am I, Your Honor. And, the idea of --

THE COURT: You're not, until I appoint you as it. And I don't know that you qualify as a fiduciary until we go

through the process.

MR. BALABANIAN: Of course. And I understand that the Court, in its notice regarding class action settlements, points out that there might be the -- a preliminary showing that's necessary. And while we've discussed that issue in our case management statement, and said that we don't need to go through a fulsome class certification briefing right now, we are prepared to do whatever the Court deems is necessary, if it would even indulge us on this issue.

And if I can just back up for a moment. We did not approach the defendant about settlement, as we set forth in our case management statement. Mr. Giali approached us at the outset of this litigation, upon our first contact, and he raised the prospect of potentially discussing settlement, with an eye towards the fact that Your Honor's order is clear that no such discussion can take place before class certification is decided by the Court.

And we accept and respect, of course, that order. And we did not even come close to the edges of talking about an actual settlement. What we did was, being familiar with this Court's order -- and we've both been before this Court before, and, and are familiar with the procedures as they relate to class actions -- we put forth to the Court in our case management statement the reasons why we think an early settlement is -- or an early settlement discussion with a Magistrate Judge is

potentially a --

THE COURT: What are those reasons?

MR. BALABANIAN: Well, the defendant has, from the outset of this case, expressed, in my view, an earnest interest in changing its practices, acknowledging that there is a problem here. And in their words, making the class whole for the alleged deception that took place in this case.

They have already undertaken changes with respect to the advertising of these products. And not at our behest, but on their own. I think that's a good step. I don't think that resolves the case in any way, shape or form. Absolutely, this case is about a class who was alleged to have been misled by the defendants' advertising of its speakers.

And I would -- Your Honor doesn't know this, because Your Honor's not familiar with me and my firm, specifically. I've had a few matters in front of you. But I certainly understand the risk and the concern about a collusive settlement where the attorneys' fees get paid -- where the attorneys get paid, and the class gets sold out with a huge release, where a case that started out small and was expanded to, you know, include claims that were never contemplated, or include nationwide status when they were really seeking California-only status. I'm familiar with all of those concerns.

And, and I would posit that I would have to be crazy to

put a settlement like that together and try to get it past this Court. And I would never do that. But --

THE COURT: That part is true. That part is true.

MR. BALABANIAN: I would have to be crazy, because I'm familiar with this court.

THE COURT: You would have to be crazy.

MR. BALABANIAN: Yes.

THE COURT: But part of the rational process is to see if you've got a legitimate class before we talk settlement.

MR. BALABANIAN: Certainly. And we can do that. But I'm -- you know, if the Court -- we have not committed to stopping discovery in this case and not seeking the necessary information to evaluate --

THE COURT: What is the gravamen of your complaint in this case? What was the advertising problem?

MR. BALABANIAN: The advertising problem was, as it relates to speakers, advertising that the technical specifications of the speakers were greater than they were. It comes down to the speaker drivers.

THE COURT: Like what?

MR. BALABANIAN: And they claim basically that there were more drivers on the speaker than there were.

THE COURT: How many drivers did they say there were?

MR. BALABANIAN: Four. And there were two, I

believe. Todd -- Mr. Logan would know better.

MR. LOGAN: Correct. Four instead of two, Your Honor.

THE COURT: What is a driver?

MR. BALABANIAN: It's the part of the speaker that essentially creates the sound, Your Honor.

THE COURT: So like the speaker. It's the part that has the electromagnet?

MR. LOGAN: Yes, Your Honor.

THE COURT: That is the driver?

MR. LOGAN: Yes, Your Honor.

THE COURT: And they said there were four, and there were really just two?

MR. LOGAN: That's exactly right, Your Honor.

THE COURT: Is that true? Is that what happened?

MR. GIALI: Your Honor, the complaint at Paragraph 15 has a picture of the speakers. The speakers do have two driver outputs. On each speaker, two of those drivers are called "active," two of them are called "passive."

The passive driver does not have the electronics and the sound box. The sound goes through it. So there are two drivers on each speaker, only one of which is active.

THE COURT: Well, wait. How could it be a driver if it's not active?

MR. GIALI: Well, there is -- far be it from me to be

the expert on sound, Your Honor, but there is science about a passive driver where sound passes through, and it does enhance the bass.

THE COURT: It could be parasitic.

MR. GIALI: I'm sorry?

THE COURT: It could be -- it's called "parasitic," is what you're saying. In other words, you could have one active element; the other one could be parasitic and actually pick up the sound waves and do some good. I'm familiar with it.

Right?

MR. LOGAN: Yes, Your Honor.

THE COURT: As parasitics, so it could be -- in some sense it could be considered a driver.

MR. LOGAN: If I may, Your Honor.

THE COURT: Go ahead.

MR. LOGAN: I believe it would be called a "radiator" at that point, which --

THE COURT: Exactly. Parasitic radiator. And so you're saying that that's fraudulent?

MR. LOGAN: Yes, Your Honor.

THE COURT: Why would that be? Because it's not -- both are not active?

MR. LOGAN: Yes, Your Honor. They've taken a traditional speaker component that is used in lots of

different speakers, and said it's a driver. A driver creates sound in every definition --

THE COURT: Parasitic, a parasitic one would -- a radiator would --

MR. LOGAN: Yeah.

THE COURT: -- sound.

MR. LOGAN: Yeah, but that's not a driver. It's not creating sound; it's not a driver. It's adjusting the frequency of sound that's getting created.

THE COURT: It is creating sound. It is creating sound. It's vibrating, and creating sound in the process. It's just not electronically driven. And it may not be nearly as effective as one that would be electronic.

So I'm not sure -- all right. Anyway, I now understand the general problem.

How have they have corrected this?

MR. LOGAN: I look to Mr. Giali for that representation.

THE COURT: Well, you told me a minute ago they had corrected it, and that's why you wanted to settle the case.

MR. BALABANIAN: They've started to change --

THE COURT: Started to change? That's like "The check is in the mail."

MR. LOGAN: Your Honor, what they've represented to us, in good faith, I understand, is that they have changed the

advertising copy. So I'm -- I'm not going to put words in Mr. Giali's mouth (Indicating), but my understanding is they're no longer going to represent that the system has four drivers. They're just going to represent that it has two drivers.

THE COURT: I want to go through the normal Rule 23 process. I want to see if the plaintiff is a legitimate plaintiff. I want to see if he's got standing. I want to go through the normal process.

I don't see any good reason -- I have appointed interim counsel in other cases where the company is going out of business, and you'd better get your money now while the getting is good. But that's not our case.

So I don't want you -- see, you lawyers ought to go out there and do -- do the homework. Find out if you have got punitive damages, find -- you know, spend the money on behalf of the class to do your due diligence.

So the motion for interim counsel on this record is denied.

Okay, now, let's go to the -- have you done your initial disclosures?

MR. BALABANIAN: Yes, Your Honor.

THE COURT: Sure you've done it right?

MR. BALABANIAN: I believe so.

THE COURT: All right. Have you laid out the dollar

amounts?

MR. BALABANIAN: Well, we've laid out our general theory of damage, Your Honor.

THE COURT: No, it's got to be dollar amounts. Read the rule? Read the rule?

MR. BALABANIAN: We have -- we have --

THE COURT: If you don't comply with the rule, then you don't have a case. Why don't you just comply -- I'm going to give you more time. I want you to go back and -- and I can tell you what the other side has done. They have not given you contact information for the witnesses they have identified. Right? Right.

But the rule says "contact info." So I'm going to give you both a chance to go back and fix up what you've done.

MR. BALABANIAN: Thank you, Your Honor.

THE COURT: I'm going to give you until September 14th.

MR. BALABANIAN: Thank Your Honor.

THE COURT: Leave to add any new parties or pleading amendments. All right, we'll say November 29.

Okay, we're going to say February 7th for your motion for class certification. Unless you want to do it -- that's the last day. You can always do it sooner. On a 49-day track.

June 28th next year will be your fact discovery cutoff. That is also the day your expert reports are due, if you have

the burden of proof on the issue.

Last day to file a motion for summary judgment will be August 1.

Final pretrial, October 9. And then trial will be on October 21. Jury trial, 7:30 a.m.

Then, I will refer you to Magistrate Judge Ryu, Donna Ryu, for mediation. Now, she is probably not going to let you do that mediation until we get a little farther along in the case, but she -- you will be on her radar screen.

Now, with all that having been said, you can try to talk me out of any of this, these dates and deadlines. What would you like to do?

MR. BALABANIAN: No -- plaintiff is fine with those deadlines, Your Honor.

THE COURT: All right.

MR. GIALI: Your Honor, defendant, as well.

THE COURT: Great. So, okay. Thank you very much.

MR. BALABANIAN: Thank Your Honor.

THE COURT: Good luck to both sides.

MR. BALABANIAN: Thank Your Honor.

(Proceedings concluded)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Friday, August 31, 2018

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LOGITECH, INC.,

Defendant.
_____/

No. C 18-03091 WHA

CASE MANAGEMENT ORDER AND REFERENCE TO MAGISTRATE JUDGE FOR MEDIATION/SETTLEMENT

After a case management conference, the Court enters the following order pursuant to Rule 16 of the Federal Rules of Civil Procedure ("FRCP") and Civil Local Rule 16-10:

1. Plaintiff's motion to appoint interim counsel is **DENIED**.

2. All initial disclosures under FRCP 26 must be completed by **SEPTEMBER 14, 2018**, on pain of preclusion under FRCP 37(c), including full and faithful compliance with FRCP 26(a)(1)(A)(iii).

3. Leave to add any new parties or to amend pleadings must be sought by **NOVEMBER 29, 2018**.

4. The motion for class certification must be filed by **FEBRUARY 7, 2019**, to be heard on a 49-day track.

5. The non-expert discovery cut-off date shall be **JUNE 28, 2019**.

6. The last date for designation of expert testimony and disclosure of full expert reports under FRCP 26(a)(2) as to any issue on which a party has the burden of proof

("opening reports") shall be **JUNE 28, 2019**. Within **FOURTEEN CALENDAR DAYS** of said deadline, all other parties must disclose any expert reports on the same issue ("opposition reports"). Within **SEVEN CALENDAR DAYS** thereafter, the party with the burden of proof must disclose any reply reports rebutting specific material in opposition reports. Reply reports must be limited to true rebuttal and should be very brief. They should not add new material that should have been placed in the opening report and the reply material will ordinarily be reserved for the rebuttal or sur-rebuttal phase of the trial. If the party with the burden of proof neglects to make a timely disclosure, the other side, if it wishes to put in expert evidence on the same issue anyway, must disclose its expert report within the fourteen-day period. In that event, the party with the burden of proof on the issue may then file a reply expert report within the seven-day period, subject to possible exclusion for "sandbagging" and, at all events, any such reply material may be presented at trial only after, if at all, the other side actually presents expert testimony to which the reply is responsive. The cutoff for all expert discovery shall be **FOURTEEN CALENDAR DAYS** after the deadline for reply reports. In aid of preparing an opposition or reply report, a responding party may depose the adverse expert sufficiently before the deadline for the opposition or reply report so as to use the testimony in preparing the response. Experts must make themselves readily available for such depositions. Alternatively, the responding party can elect to depose the expert later in the expert-discovery period. An expert, however, may be deposed only once unless the expert is used for different opening and/or opposition reports, in which case the expert may be deposed independently on the subject matter of each report. At least **28 CALENDAR DAYS** before the due date for opening reports, each party shall serve a list of issues on which it will offer any expert testimony in its case-in-chief (including from non-retained experts). This is so that all parties will be timely able to obtain counter-experts on the listed issues and to facilitate the timely completeness of all expert reports. Failure to so disclose may result in preclusion.

7. As to damages studies, the cut-off date for *past damages* will be as of the expert report (or such earlier date as the expert may select). In addition, the experts may try to project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future damages can be met. With timely leave of Court or by written stipulation, the experts may update their reports (with supplemental reports) to a date closer to the time of trial.

8. At trial, the opening testimony of experts on direct examination will be limited to the matters disclosed in their opening reports (and any reply reports may be covered only on rebuttal or sur-rebuttal). Omitted material may not ordinarily be added on direct examination. This means the reports must be complete and sufficiently detailed. Illustrative animations, diagrams, charts and models may be used on direct examination only if they were part of the expert's report, with the exception of simple drawings and tabulations that plainly illustrate what is already in the report, which can be drawn by the witness at trial or otherwise shown to the jury. If cross-examination fairly opens the door, however, an expert may go beyond the written report on cross-examination and/or redirect examination. By written stipulation, of course, all sides may relax these requirements. For trial, an expert must learn and testify to the full amount of billing and unbilled time by him or his firm on the engagement.

9. To head off a recurring problem, experts lacking percipient knowledge should avoid vouching for the credibility of witnesses, *i.e.*, whose version of the facts in dispute is correct. This means that they may not, for example, testify that based upon a review of fact depositions and other material supplied by counsel, a police officer did (or did not) violate standards. Rather, the expert should be asked for his or her opinion based — explicitly — upon an assumed fact scenario. This will make clear that the witness is not attempting to make credibility and fact findings and thereby to invade the province of the jury. Of course, a qualified expert can testify to relevant customs, usages, practices, recognized standards of conduct, and other specialized matters beyond the ken of a lay jury. This subject is addressed further in the trial guidelines referenced below.

10. Counsel need not request a motion hearing date and may notice non-discovery motions for any Thursday (excepting holidays) at 8:00 a.m. The Court sometimes rules on the papers, issuing a written order and vacating the hearing. If a written request for oral argument is filed before a ruling, stating that a lawyer of four or fewer years out of law school will conduct the oral argument or at least the lion's share, then the Court will hear oral argument, believing that young lawyers need more opportunities for appearances than they usually receive. Unless discovery supervision has been referred to a magistrate judge, discovery motions should be as per the supplemental order referenced below.

11. The last date to file dispositive motions shall be **AUGUST 1, 2019**. No dispositive motions shall be heard more than 35 days *after* this deadline, *i.e.*, if any party waits until the last day to file, then the parties must adhere to the 35-day track in order to avoid pressure on the trial date.

12. The **FINAL PRETRIAL CONFERENCE** shall be held on **OCTOBER 9, 2019**, at **2:00 P.M.** Although the Court encourages argument and participation by younger attorneys, lead trial counsel must attend the final pretrial conference. For the form of submissions for the final pretrial conference and trial, please see paragraph below.

13. A **JURY TRIAL** shall begin on **OCTOBER 21, 2019**, at **7:30 A.M.**, in Courtroom 12, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102. The trial schedule and time limits shall be set at the final pretrial conference. Although almost all trials proceed on the date scheduled, it may be necessary on occasion for a case to trail, meaning the trial may commence a few days or even a few weeks after the date stated above, due to calendar congestion and the need to give priority to criminal trials. Counsel and the parties should plan accordingly, including advising witnesses.

14. Counsel may not stipulate around the foregoing dates without Court approval.

15. While the Court encourages the parties to engage in settlement discussions, please do not ask for any extensions on the ground of settlement discussions or on the ground that the parties experienced delays in scheduling settlement conferences, mediation or ENE.

The parties should proceed to prepare their cases for trial. No continuance (even if stipulated) shall be granted on the ground of incomplete preparation without competent and detailed declarations setting forth good cause.

16. To avoid any misunderstanding with respect to the final pretrial conference and trial, the Court wishes to emphasize that all filings and appearances must be made — on pain of dismissal, default or other sanction — unless and until a dismissal fully resolving the case is received. It will not be enough to inform the clerk that a settlement in principle has been reached or to lodge a partially executed settlement agreement or to lodge a fully executed agreement (or dismissal) that resolves less than the entire case. Where, however, a fully-executed settlement agreement clearly and fully disposing of the entire case is lodged reasonably in advance of the pretrial conference or trial and only a ministerial act remains, the Court will arrange a telephone conference to work out an alternate procedure pending a formal dismissal.

17. If you have not already done so, please read and follow the "Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup" and other orders issued by the Clerk's office when this action was commenced. Among other things, the supplemental order explains when submissions are to go to the Clerk's Office (the general rule) versus when submissions may go directly to chambers (rarely). With respect to the final pretrial conference and trial, please read and follow the "Guidelines For Trial and Final Pretrial Conference in Civil Jury Cases Before The Honorable William Alsup." All orders and guidelines referenced in the paragraph are available on the district court's website at http://www.cand.uscourts.gov. The website also includes other guidelines for attorney's fees motions and the necessary form of attorney time records for cases before Judge Alsup. If you do not have access to the Internet, you may contact Deputy Clerk Dawn Logan at (415) 522-2020 to learn how to pick up a hard copy.

18. All pretrial disclosures under FRCP 26(a)(3) and objections required by FRCP 26(a)(3) must be made on the schedule established by said rule.

19. This matter is hereby **REFERRED** to **MAGISTRATE JUDGE DONNA M. RYU** for mediation/settlement.

IT IS SO ORDERED.

Dated: August 23, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOGITECH, INC.,

Defendant.
_____/

No. C 18-03091 WHA

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION AND TO STAY THE ACTION

To protect absent class members and to assist counsel in understanding the factors the Court considers in evaluating proposed class settlements, the undersigned judge has long provided guidance to both sides at the outset of any proposed class action. The guidance has been in the form of an order entitled "Notice and Order Re Putative Class Actions and Factors To Be Evaluated For Any Proposed Class Settlement." No one has ever complained about it — until now. Defendant Logitech, Inc. objects to a requirement regulating the timing of settlement discussions of class-wide claims, contending it violates its First Amendment rights. This order disagrees with Logitech and explains why the provision in question is in the best interest of absent class members and is constitutional.

Plaintiff James Porath filed this putative class action in May 2018, alleging that Logitech falsely and deceptively advertised its Z200 speakers as containing four drivers when in fact two of those drivers did not independently produce sound and were parasitic speakers (Dkt. No. 1 at 4–5, 15–25). In June 2018, the usual order issued describing the factors for evaluating any class action settlement and prohibiting the parties from discussing any settlement

of class claims prior to class certification. That prohibition was qualified by the further statement that if "counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made" (Dkt. No. 16). (The order dealt only with class settlements and did not bar counsel from discussing settlement of plaintiff's individual claim.)

In August 2018, counsel moved to appoint interim lead plaintiff and lead counsel under Federal Rule of Civil Procedure 23(g) (Dkt. No. 25). The parties stipulated to four reasons why they believed pre-class certification settlement discussions might have been appropriate at that moment: (1) Logitech agreed not to seek a "discount" based on the potential risk that the putative class would not be certified; (2) Logitech had already began revising the advertising at issue; (3) Logitech was prepared "with respect to purchases of the Z200 speakers to make all such consumers whole" (separately, in a case management statement, defendant further specified: "whole with respect to any damages that may have been caused by the challenged advertising"); and (4) the parties were prepared to engage in reasonable and appropriate discovery to develop the factual record necessary to resolve the case (Dkt. No. 23, 24). After considering the arguments from the parties' motion and at the initial case management conference, the motion to appoint interim counsel was denied.

Logitech then petitioned our court of appeals in October 2018 for a writ of mandamus. A motion to stay the action pending resolution by our court of appeals followed much later (Dkt. No. 33). Before this Court, however, could rule on the stay request, our court of appeals denied the petition without prejudice "to re-raising the . . . constitutional questions presented in this petition . . . in this court after presentation to the district court in the first instance." Order, *Logitech, Inc. v. United States District Court for the Northern District of California, San Francisco*, No. 18-72732 (9th Cir. Dec. 24, 2018). The motion to stay was then denied as moot, but "without prejudice to a fresh motion as contemplated by the court of appeals" (Dkt. No. 35).

Logitech now moves for leave to file a motion for reconsideration of the orders issued last June (prohibiting the parties from discussing any class-wide settlement until after the Court determines which claims deserve class treatment or until an appointment of interim counsel

under Rule 23) and last August (denying the motion for appointment of interim class counsel) and to stay the action (Dkt. No. 38). Plaintiff's counsel take no position (Dkt. No. 39). No hearing having been requested, this order follows.

Logitech's motion is **DENIED**.

The basic problem concerns the protection of absent class members. For the orderly management of putative class actions and for the protection of absent class members, the Court directs the parties not to discuss class-wide settlements until we determine what claims are suitable for class treatment under Rule 23. Thereafter, of course, it becomes the duty of counsel to consider settlement on a class-wide basis — but only of those certified claims. This avoids the awkward situation in which counsel waste time on a proposed settlement of issues that should not be litigated or settled on a class-wide basis. And, it avoids the creation of an artificial ceiling for the value of a case before we determine which issues deserve class treatment. It also avoids overbroad releases by absent class members of claims that should not be released.

As importantly, it protects the absent class members from inappropriately discounted settlements. Once a claim is certified for class treatment, everyone agrees that a class settlement may be discounted based on the merits of the claim. On the other hand, the recovery by absent class members should *not* be further discounted by the risk that a claim will not eventually be certified for class treatment. This view is supported by Professor Howard Erichson. *See, e.g.*, Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 WASH. U. L. REV. 951 (2014); Howard M. Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL, Nov. 24, 2014.

For example, counsel for plaintiff may fear that particular claims will not be certified for class treatment due to lack of a class-wide method of proof. Counsel, therefore, might be tempted to accept a lowball offer to salvage a class recovery. Other similar Rule 23 hurdles concern standing or adequacy of representation. These might also lead to a further discount, further reducing recovery to absent class members. Postponing class settlement discussion until

after we determine which claims are class-worthy prevents these concerns from reducing a class recovery.

With respect to the individual claim of a plaintiff, the procedure in question permits any discussion at any time. As to absent class members, however, plaintiff's counsel have no authority to negotiate for the absent class members until a standard appointment under Rule 23(g)(1) or an appointment as "interim counsel" under Rule 23(g)(3). It is in the best interest of absent class members to first work through the protections of Rule 23 to define what claims, if any, are suitable for class treatment, what specific classes and subclasses, if any, are viable, and whether or not plaintiff and his counsel are adequate to represent absent class members. These should be vetted before discussions take place so the rights of the absent class members won't be compromised on problems other than the merits.

The guidelines further state that a settlement should be negotiated only after adequate and reasonable investigation and discovery by class counsel. This requirement serves the due diligence obligation of class counsel, who owe a fiduciary duty to the class to develop the facts well enough to negotiate a good settlement. Our court of appeals emphasized the "rigorous analysis" required by the district court in class action determinations and the role discovery plays in this analysis in recently invalidating a local rule that required moving for class certification within ninety days of filing the complaint. Such rigorous analysis "may require discovery" and take more than ninety days. *ABS Entertainment, Inc. v. CBS Corporation*, 908 F.3d 405, 427 (9th Cir. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011)).

In this same vein, one of the factors the Court "must consider" in appointing interim class counsel and class counsel is "the work counsel has done in identifying or investigating potential claims in the action." Rule 23(g)(1)(A)(i). Here, at the time of the original motion for appointment of interim counsel, plaintiff's counsel said they would do some homework, but they didn't say that they had yet done it. That remains true today.

The guidelines in question have long recognized that pre-certification settlement discussions are sometimes warranted. The guidelines invite counsel to move to be appointed as

"interim counsel" for precisely this purpose. As stated, Rule 23(g)(3) specifically calls out appointment of "interim counsel." One circumstance where such a motion would likely be granted is where the defendant has dwindling resources such that a prompt settlement is necessary to recover anything at all, even when little discovery has been possible.

When counsel here moved for the appointment of interim counsel, however, no showing of dire circumstances was made. No discovery had been conducted (Dkt. No. 23 at 4). Even though defendant's counsel vaguely stated that Logitech was prepared to make all purchasers "whole with respect to any damages that may have been caused by the challenged advertising," this clever wording offered little of substance, not even conceding that there had been "any" damages (Dkt. No. 23 at 6). Making the class "whole" could have meant a number of unacceptable scenarios, such as a mere coupon that would've burdened class members with a trip to a distant service center, or a cash refund only to those willing to fill out a laborious claim form. The record was therefore too conclusory, and thus, did not warrant such an appointment. Even now, Logitech's motion for reconsideration states nothing new.

Whether or not to appoint interim counsel is an issue of discretion for the district court. Logitech merely disagrees with the exercise of discretion by the district judge in this case. It is true that amendments to Rule 23 contemplate that a proposed settlement may be presented before a class has been certified. But, at the risk of repetition, so do the guidelines in question. Both turn on the interim counsel device.

With respect to free speech, the viewpoint neutral guidelines in question allow for plenty of settlement discussion and merely regulate the time, place, and manner of these discussions. The only restraint is on talking about a class-wide settlement before someone is authorized under Rule 23 to negotiate on behalf of a class — a sensible precaution for the protection of absent class members.

Full settlement discussions *at any time* with respect to the individual claim are permitted. Full settlement discussions as to class claims are permitted once those class claims are identified or after interim counsel is appointed. No permanent or overly broad ban on speech exists. To the extent a limited restriction exists, the interests are overwhelmingly

outweighed by the interest of the Court in effectuating orderly case management and the interests of the absent class members whose rights are also at risk. *See, e.g., U.S. v. Richey*, 924 F.2d 857, 859 (9th Cir. 1991); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977). Counsel has no specific First Amendment right to try to extract a class-wide release from a lawyer who has no authority to act for a class (meaning, someone who has not yet been certified as class counsel or appointed as interim counsel).

No one has a First Amendment right to petition the government (including the courts) on behalf of a class and to impose a release onto a class until a proper representative has been appointed to look out for the class. It is true that some judges don't insist on such an appointment beforehand, but that is a matter of discretion, not a matter of right by the litigants. Logitech cites no case-law to the contrary.

No new facts have been shown to warrant reconsideration of either prior order. The motion for leave to file a motion for reconsideration of both the orders issued last June and August is **DENIED**. As provided in the original case management order, the motion for class certification remains due on February 7 to be heard on a 49-day track. All other deadlines remain in effect.

The class certification motion will be decided one way or the other long before any extraordinary writ petition could be determined by our court of appeals, so the motion to stay is **DENIED** on that ground (as well as on the merits).

IT IS SO ORDERED.

Dated: January 18, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California